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No. 89-453

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER METRO BROADCASTING

SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
233 Pennsylvania Ave., S.E.
Suite 200
Washington, D.C. 20003
Telephone: (202) 547-1010
*Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER METRO BROADCASTING

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Pursuant to Supreme Court Rule 36.1, the Competitive Enterprise Institute (CEI) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of petitioner Metro Broadcasting. Consent to the filing of this brief has been received from both the Acting Solicitor General, on behalf of the respondent Federal Communications Commission (FCC), and from Metro Broadcasting. (These consent letters have been lodged with the Clerk of this Court.) However, counsel for the second respondent in this case, Rainbow Broadcasting Company, has refused consent.

Rule 36.1 states that such motions are disfavored. Nonetheless, CEI submits that this motion is justified because it seeks to present to this Court a new constitutional issue in this case, one whose dimensions did not become apparent until *after* Metro Broadcasting had filed its certiorari petition. That issue is whether the "muzzling" laws that barred the FCC from reexamining its racial and gender preference policies for awarding broadcasting licenses violated the Recommendation Clause of the United States Constitution, Art. II, sec. 3, which provides that the President

> "shall . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient."

As the record in this case makes clear, these muzzling laws directly resulted in Metro Broadcasting's failure to receive the broadcast license here at issue.

In its "Questions Presented For Review", Metro challenged the constitutionality of these muzzling laws on equal protection grounds. However, on October 3, 1989, less than three weeks after Metro filed its certiorari petition, the Georgetown Law Journal published an in-depth study of the Recommendation Clause and its implications for such muzzling laws. Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989). The purpose of the attached amicus brief is to bring this new aspect of this constitutional controversy to this Court's attention and to urge that, should certiorari be granted, the Recommendation Clause issue be added to the questions presented for review.

CEI's interest in this issue is based on its involvement in communications policy and other regulatory matters. CEI is a nonprofit policy analysis organization, founded in 1984, dedicated to promoting private approaches to regulatory issues. In a number of areas in which CEI has been actively involved, such as antitrust policy and privatization, CEI has seen administrative reform efforts frozen by muzzling laws such as those involved here.

This case presents a particularly egregious example, involving the imposition of racial and gender preferences which the administering agency itself was in the midst of reexamining. It is an exceptionally appropriate setting for this Court to examine the validity of muzzling laws under the Recommendation Clause of the Constitution.

For these reasons, CEI's motion for leave to file the attached amicus brief should be granted.

Respectfully submitted,

SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
233 Pennsylvania Ave., S.E.
Suite 200
Washington, D.C. 20003
Telephone: (202) 547-1010
*Counsel of Record*

December 5, 1989

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## BRIEF AMICUS CURIAE OF COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER METRO BROADCASTING

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### INTEREST OF AMICUS CURIAE

The interest of the Competitive Enterprise Institute (CEI) in this case is set forth in the preceding motion for leave to file this amicus brief.

### SUMMARY OF ARGUMENT

Metro Broadcasting's petition for certiorari raises important constitutional issues regarding the Federal Communications Commission's (FCC) reliance on minority preferences in awarding broadcast licenses. After that petition was filed, however, a law review article was pub-

lished that establishes a new constitutional question in this case: whether the appropriations act "muzzling" provision that forced the FCC to cease its reexamination of minority preferences is valid under the Recommendation Clause of the Constitution, Article II, section 3. On the basis of a detailed examination of the clause's history and rationale, the article's author makes a persuasive case that such muzzling laws impermissibly restrict the President's ability to make policy recommendations to Congress.

For these reasons, certiorari should be granted in this case, and the questions presented for review should be expanded by this Court to include the Recommendation Clause issue.

## ARGUMENT

### THE CONFLICT BETWEEN CONGRESS' MUZZLING OF THE FCC AND THE RECOMMENDATION CLAUSE OF THE CONSTITUTION IS AN ISSUE THAT SHOULD BE ADDED TO THE 'CERTWORTHY' QUESTIONS PRESENTED IN THIS CASE

At issue in this case is the validity of the FCC's use of ethnic and gender preferences to deny a construction permit for a UHF television station in Florida to the petitioner, Metro Broadcasting. As the record makes clear, these preferences were the reason for the FCC's rejection of Metro Broadcasting in favor of its competitor, Rainbow Broadcasting. In the words of the court of appeals' decision below:

> "the Commission found that Rainbow had no clear quantitative advantage and that deletion of Rainbow's minority preference could reverse the outcome of the case." *Winter Park Communications, Inc. v. FCC*, 873 F.2d 349, 351 (D.C. Cir. 1989) (citation omitted), Appendix to Petition for Certiorari (App.) at 6a.



These minority preferences, however, were also the subject of a full-fledged reexamination proceeding by the FCC, and the agency suspended its decision on Metro's application pending the outcome of that proceeding. App. at 49a. Unfortunately, this reexamination was stopped dead in its tracks by the "muzzling" provision of the continuing resolution for fiscal year 1988, which barred the FCC from using its appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its minority and gender preferences in license proceedings. 873 F.2d at 351, App. at 6a, quoting from Pub. L. No. 100-202, 101 Stat. 1329 (1987). As a result, the FCC was forced to reinstate its rejection of Metro's application. App. at 51a.

In its petition for certiorari, filed on September 18, 1989, Metro challenged the constitutionality of this muzzling provision (and of a similar one in the 1989 appropriations act) on equal protection grounds. *See* "Questions Presented For Review", Metro Petition at i. Shortly thereafter, on October 3d, a lengthy article appeared in the Georgetown Law Journal making the novel and persuasive case that such muzzling laws violate the Recommendation Clause of the Constitution, Article II, section 3. Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989).

As is shown below, the constitutional issue raised in this article is an increasingly serious one. In the event that certiorari is granted in this case (as CEI believes it should be), this Court should exercise its power to expand the questions presented for review to include this issue.

The Recommendation Clause states that the President

> "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."

The recommendation of measures by the President is one of his two basic "functions in the lawmaking process". *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). It is this executive power that is directly at odds with muzzling laws. Defining such laws as "any legislation that impairs the Executive's ability to deploy resources to study or advocate a change in the federal government's policies on a particular issue", Mr. Sidak contends that

> "all muzzling laws implicate, and many violate, the principle of separation of powers. When Congress prohibits the President from studying or advocating a change in policy, it impairs the President's ability to perform his constitutional duty to inform Congress and make recommendations for its consideration." 77 Geo. L.J. at 2080.

Mr. Sidak begins with James Madison's notes on the Constitutional Convention, which demonstrate that the Framers, in changing the proposed wording of this phrase from "may recommend" to "shall recommend", "elevated the President's recommendation of measures from a political prerogative to a constitutional duty." *Id.* at 2081 (citation omitted). He traces this duty through President Woodrow Wilson's 1920 veto of a bill to restrict the printing of Executive Branch documents; in President Wilson's words, he would "not concede the right [of Congress] to prescribe 'regulations' under which executive departments may operate." *Id.* at 2098.

During the Reagan administration muzzling laws were enacted on a greatly expanded number of subjects, among them agricultural marketing orders, antitrust policy, privatization, and the FCC minority preferences that are at issue in this case. *Id.* at 2079-80, 2128-32. The administration's acceptance of these laws in no way foreclosed the question of their validity. "President Reagan's acquiescence to muzzling laws was itself unconstitutional,



for the President may not negotiate away his performance of an article II duty." *Id.* at 2135.

(As Mr. Sidak points out, even though the FCC is an independent agency, it exercises a substantial amount of executive power that has been delegated to it by the President. "Thus, Congress can no more abridge the FCC's ability to obey the recommendation clause than it can abridge the President's ability to do so." *Id.* at 2131.)

It is clear that the FCC muzzling law has a fundamental impact on the agency's ability to operate. The dissent from the panel's constitutional analysis in the decision below characterizes the muzzling provision as imposing "a kind of mental standstill" upon the FCC. 873 F.2d at 364, App. at 35a (Williams, J., concurring in part and dissenting in part). In *Shurberg Broadcasting, Inc. v. FCC*, in which another panel of the court of appeals issued a decision directly contrary to the one below, Judge Silberman pointed out in his separate opinion that the muzzling law

> "carries serious constitutional implications, because there is little difference between stripping a court of jurisdiction and stripping the Executive Branch or an independent agency of authority to comply with orders of the court." 876 F.2d 902, 925 n.39 (D.C. Cir. 1989), petition for certiorari pending sub nom. *Astroline Communications Co. v. Shurberg*, No. 89-700 (filed Oct. 30, 1989).

As is shown above, the Recommendation Clause issue raised by Mr. Sidak's article casts a new light on this controversy.

It is true that the issues before this Court are generally limited to those raised in the petition for certiorari. However, "it is undoubtedly within [the Court's] power to consider" other questions as well. *United States v. Leon*, 468 U.S. 897, 905 (1984); *see, e.g., Alexander v.*

*Virginia*, 408 U.S. 921 (1972) (new constitutional issue raised by the Court in granting certiorari "in addition to those questions presented in the petition"); *Neely v. Eby Construction Co.*, 382 U.S. 914 (1965) (two procedural issues added by the Court to the questions raised by petitioner). It would be highly appropriate for the Court to exercise this power in this particular case, and to consider the Recommendation Clause issue.

## CONCLUSION

CEI submits that certiorari should be granted in this case, and that the issue of the FCC muzzling law's validity under the Recommendation Clause should be added to the questions which this Court will review.

Respectfully submitted,

SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
233 Pennsylvania Ave., S.E.
Suite 200
Washington, D.C 20003
Telephone: (202) 547-1010
*Counsel of Record*

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